No. 82-1414

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PRATT-FARNSWORTH, INC., *et al.*,
Petitioners,

v.

CARPENTERS LOCAL UNION NO. 1846, ETC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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STATEMENT

We adopt as our statement of the case the portion of the court of appeals' opinion entitled "Factual and Procedural Background." (690 F.2d at 497-500.) Indeed, we were tempted, in lieu of a brief in opposition, to rest on an invitation to the Court to read Judge Randall's entire opinion for the court below, which deals in an exceptionally thorough and thoughtful manner with all the issues presented in the *certiorari* petition. However, while we cannot hope to improve upon the court of appeals' analysis, we have concluded that we may be able to aid this Court by demonstrating the patent inadequacies of the petitioners' response to that analysis and by focusing on the further grounds why this Court's standards for granting a writ of *certiorari* have not been met. In the latter regard, we shall stress: (1) the *interlocutory*

stage of this litigation (underlined by the court of appeals' careful disclaimer of any resolution on the merits)[1]; (2) the error of petitioners' claim that the decision below conflicts with decisions of this Court and other courts; and (3) petitioners' failure in its third and fourth question to present general questions of law, by instead objecting only to the court of appeals' *interpretation of the agreement and pleadings in this case.*

REASONS FOR DENYING THE PETITION

A. Questions I & II Presented By Petitioners Do Not Warrant This Court's Review.[2]

(i) Petitioners' principal contention is that the decision of the court of appeals reinstating the contract claims against Pratt-Farnsworth and Halmar is contrary to *South Prairie Constr. v. Operating Engineers*, 425 U.S. 800 (hereafter "*Peter Kiewit*"). For convenience, we reiterate petitioners' description of *Peter Kiewit*:

> In that case, the Board had decided that the two operations in a "double-breasted" construction entity were separate employers. The Court of Appeals reversed, finding the companies to be a single employer, and the employees a single bargaining unit. The Supreme Court reversed on this issue stating that for the Court of Appeals to "take upon itself the initial determination of this issues was "*incompatible with the orderly function of the process of judicial review.*" 425 U.S. at 805. [Pet. 7; emphasis added.][3]

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[1] The district court had dismissed the complaint in its entirety. The court of appeals "affirm[ed] the dismissal of certain claims, revers[ed] the dismissal of others, and remand[ed] to the district court for further proceedings and development of a more complete factual record." (690 F.2d at 497; see also *id.* at 536-537.)

[2] These two questions are on their face closely linked and are discussed together in the petition at pp. 5-19.

[3] We note that while petitioners question whether "a district court has authority to determine whether two construction companies are

Petitioners continue by placing special reliance on the following sentence from *Peter Kiewit*:

> Since the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, "if not final, is rarely to be disturbed," *Packard Motor Co. v. NLRB*, 330 U.S. 485, 491, we think the function of the Court of Appeals ended when the Board's error on the "employer" issue was "laid bare." *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). [425 U.S. at 806, quoted at Pet. 7.]

In a painstaking discussion of *Peter Kiewit* (690 F.2d at 513-517), the court of appeals concluded that this Court negated only the authority of the courts to decide bargaining unit issues in the first instance when these arise on review of a National Labor Relations Board decision. The court below especially disagreed with the view that the above-quoted sentence "stands for the proposition for which it and *Peter Kiewit* are cited by the defendants—that the Board has exclusive jurisdiction to decide appropriateness of the bargaining unit issues" (690 F.2d at 514):

> We think instead that the Court in *Peter Kiewit* was applying a time-honored principle relating to appellate review of an agency determination. When an agency, in order to grant relief in the case before it, must as a matter of statute find that both factual or legal conclusion A (e.g., single employer status) and factual or legal conclusion B (e.g., appropriateness

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a single employer" (Pet. i. Question 2), no argument to the contrary is presented. And while petitioners also raise a question as to whether a court may decide "whether the union represents a majority of the employees in [a] single unit" and "whether or not [the] unions enjoy a majority status" (*id.* i; 5-6), petitioners have not presented any facts raising a question as to whether the respondent union represented a majority of Pratt-Farnsworth's employees. Finally, if as is alleged in the complaint, Halmar is the alter ego of Pratt-Farnsworth, Halmar would in any event be bound by Pratt-Farnsworth's contract. (See *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 259.)

of the bargaining unit) have been established, but concludes that A had not been established and therefore declines to consider whether B has been established, a reviewing court that reverses the conclusion that A has not been established must remand to the agency to permit it to consider in the first instance whether B has been established.

Section 9(b), which is the source of the Board's responsibility in an unfair labor practice context to make a determination of the appropriateness of the bargaining unit in a single employer case such as *Peter Kiewit*, and which is set forth in the Supreme Court's opinion in *Peter Kiewit*, directs the Board to "decide *in each case* whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the NLRA] the unit appropriate for the purposes of collective bargaining shall be the employer unit craft unit, plant unit or subdivision thereof. . ." 29 U.S.C. § 159(b) (emphasis added). Clearly section 9(b) refers only to cases pending before the Board under the NLRA. *Neither section 9(b) nor the Supreme Court's decision in Peter Kiewit stands for the proposition that a federal court with jurisdiction under section 301 of the LMRA to decide cases alleging a breach of a collective bargaining agreement by related employers does not have jurisdiction to determine whether a bargaining unit comprising the employees of such employers is appropriate where such a determination is necessary to a resolution of the breach of contract issue that is consistent with national labor policy.* [690 F. 2d at 514-515; emphasis added]

We agree with petitioners' response to the foregoing in so far as that response rests on the proposition that "putting the [quoted] sentence [from *Peter Kiewit*] 'in context' requires a review of [the] earlier case" which had been cited and quoted in *Peter Kiewit*—*viz.*, *Packard Motor Co. v. NLRB*, 330 U.S. 485, 491. (Pet. 7.) But petitioners' discussion of *Packard* (Pet. 7-8) overlooks the

critical point—that *Packard* itself was decided on review of a decision of the Labor Board, and turned on the appropriate scope of judicial review of Board decisions. (330 U.S. at 491.) Indeed, not only *Peter Kiewit*, but every one of this Court's decisions cited therein deals with the proper exercise of the courts' authority to review the decisions of administrative agencies. Neither *Peter Kiewit* nor any of the cited cases deals with § 301 of the LMRA or with any other provision of law which grants original jurisdiction to the courts. Thus, the court of appeals' interpretation of *Peter Kiewit* is confirmed by the latter's citation of *Packard*, as well as by the citation in the same sentence of *FPC v. Idaho Power Co.*, 344 U.S. 17, 20, which likewise dealt with the proper relationship between courts and administrative agencies, and, of course, was not remotely concerned with bargaining units.

In sum, petitioners' contention that the court of appeals in this case has not "properly applied" *Peter Kiewit* (Pet. i) is entirely insubstantial.

(ii) The fundamental difference between the *Peter Kiewit* case and this case just discussed, is decisive also in determining whether this is an appropriate vehicle for reviewing the related question presented by the petition: "Whether a district court has, in the first instance, authority to determine an appropriate bargaining unit." (Pet. i). For at least at this stage of the litigation petitioners have not established that the district court will *ever* have to "determine an appropriate bargaining unit" in order to adjudicate this case. Such a determination was essential in *Peter Kiewit* because the employers there were charged with an unfair labor practice under § 8(a)(5) of the National Labor Relations Act, which makes it unlawful for an employer "to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 9 of this Act." Section 9(a), which is thus incorporated by reference in § 8(a)(5) provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees *in a unit appropriate for such purposes*, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * * [emphasis added]

A union's status as majority representative in a § 9(a) bargaining unit is therefore an essential element of a § 8(a)(5) unfair labor practice such as was charged in *Peter Kiewit*. And even where the union represents a majority in some bargaining unit, there can be no violation of § 8(a)(5) unless that unit is "appropriate".[4] Section 301(a), however, does not refer to § 9(a); nor does § 301 in any other way provide that a contract is enforceable only if the contract covers an appropriate bargaining unit. Thus, there is nothing inherent in a claim under § 301 requiring a district court to decide a unit issue as a condition for granting relief under § 301.

To be sure, cases can arise in which a contract claim is merely a disguised effort to secure representation over employees without recourse to the processes of the NLRB under § 9(a). In such a case the court need not and should not permit its processes to be abused. But it will be a rare case in which a claim can be so characterized at the complaint stage. And in *this* complaint there is no allegation concerning the appropriateness of the unit covered by the contract; nor is there a prayer, express or implied, that the plaintiff union (let alone the plaintiff trust funds) be given representative status over any employees. Indeed, while we need not go beyond the complaint at this stage, petitioners admit that "Pratt-Farnsworth is a signatory to [the] contracts" which are

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[4] Therefore, it has been recognized from the beginning that an employer can defend against a § 8(a)(5) charge by showing that the Board has erred in determining that the unit which is certified is an appropriate unit. (See *Pittsburgh Plate Glass Co. v. Labor Board*, 313 U.S. 146.)

the subject of this action. (Pet. 4). And petitioners make no showing that it is necessary to decide any unit issue to establish that Pratt-Farnsworth violated the contract by creating its alleged alter ego Halmar in order to evade its contractual obligations. Pratt-Farnsworth nevertheless asserts that the district court is without jurisdiction to adjudicate even the breach of contract claim against it.[5]

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[5] Petitioners also assert that the decision below is in conflict with decisions of other circuits. They rely most heavily on *Teamsters Local 70 v. California Consolidators, Inc.*, 693 F.2d 81 (C.A. 9) (hereafter "*Consolidators*"), which issued after the decision below. In *Consolidators* the union did not sue the corporation which was the signatory to the collective agreement (the equivalent of Pratt-Farnsworth in this case). Rather, the union sued only another corporation which was alleged to be a "single employer" with the signatory to the contract—*viz.*, the only defendant in that case was a corporation in the position of Halmar in this case. The Ninth Circuit held:

> Local 70 sought a declaration that Consolidators was bound to the collective bargaining agreement signed by Marathon, not merely that the companies constituted a single employer. *If the complaint had stated an actual controversy and requested declaratory relief that the companies were a single employer, the court would have had jurisdiction to determine it.* Instead, it sought relief that would require the court to decide the appropriateness of a bargaining unit, a representational question reserved in the first instance to the Board. [693 F.2d at 83-84, emphasis added, footnotes omitted.]

The present complaint, by contrast contains precisely the allegation which the Ninth Circuit in *Consolidators* held is within the district court's jurisdiction to decide. Moreover, as is clear from the first sentence of its opinion, the Ninth Circuit in *Consolidators* viewed the union's objective to be "to represent the employees at California Consolidators, Inc." (693 F.2d at 81). In the other two court of appeals' decisions with which petitioners assert a conflict of decisions (Pet. 13-17) the union also plainly sought to secure representation rights. Petitioners' own lack of confidence in their claim of a genuine intercircuit conflict is evidenced by their reliance on what is concededly "dicta" of another court (Pet. 18), on two decisions which (like *Peter Kiewit*, but unlike this case) arose on review of NLRB orders (Pet. 19) and two district court cases (*id.*).

The Court of Appeals recognized (690 F.2d at 523-525) that it may be unnecessary for the district court to make any determination with respect to the appropriate bargaining unit. Further, as the Court of Appeals explained (*id.* at 525) the nature of any unit issue will depend on whether the plaintiffs prove that Halmar is the alter ego of Pratt-Farnsworth, or only that the petitioners constitute a "single employer." Thus, the question of jurisdiction which petitioners would have this Court decide now would either be rendered wholly academic or considerably illuminated by the proceedings on remand directed by the court of appeals. To oust the district court of the jurisdiction granted by § 301 over contract claims by the mere assertion—on a motion to dismiss—that a bargaining unit issue is raised would undermine the Congressional policy favoring the enforcement of labor contracts.[6]

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[6] As the court of appeals cogently observed (690 F.2d at 518):

> We have seen that in deciding whether a collective bargaining agreement has been breached, the federal courts have been directed by Congress to create a federal common law of contract, fashioned from the policy of our national labor laws, applicable to collective bargaining agreements. [*Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-457]. We are faced here with one of the most fundamental questions that can arise in a contract suit, namely: who is bound by this contract? To say that the courts and not the Board are solely entitled to pass upon contractual disputes and at the same time to deny the courts the power to determine in a fashion consistent with the policy of our national labor laws the identity of the persons or entities obligated by the contract is self-contradictory. If anything, the power to enforce a contract must necessarily include the ability to decide who is bound by the contract. No question is more basic to the existence of contractual rights. Thus to the extent that the identity of the obligees is bound up in representational issues, the federal courts must be empowered to decide those issues for the purpose of determining contractual rights and obligations.

B. Question III Presented By Petitioners Does Not Warrant This Court's Review.

Petitioners' third question presented challenges the court of appeals' ruling "that even though the unions failed to attempt to exhaust grievance and arbitration procedures, the lawsuit should not be dismissed as it is not clear whether or not these procedures were mandatory." (Pet. 19, citing 690 F. 2d at 528.) Petitioners' claim of error in this respect is utterly unworthy of review by this Court.

Once again, it is essential to keep in mind just what the court of appeals did and did not decide in the ruling which petitioners challenge. Petitioners had submitted to the trial court selected pages from the agreement between the respondent unions and Pratt-Farnsworth, together with an affidavit of the latter's president to the effect that the unions had not brought or attempted to bring a grievance on the matters that are the subject of this lawsuit. (See 690 F.2d at 527-528.) While the district court gave the failure to exhaust as an alternative ground for dismissal of the complaint, the court of appeals concluded that "such a holding was premature." (690 F.2d at 528.)[7] The court of appeals noted that the petitioners had omitted to provide that article of the agreement which described the subjects which were excluded from the arbitration process, and observed further that other provisions of the agreement raised "questions of interpretation and possible waiver which we do not think were adequately addressed by the district court." (*Id.*) The court of appeals instructed the district court to "closely examine the language of the entire contract" and to "separate for purposes of analysis" the respondent unions' claims

[7] That court properly recognized that because the district court had considered matters outside the pleadings, the dismissal on this ground had to be viewed as the grant of a motion for summary judgment, which is proper only where there are no factual matters in dispute.

against each of the petitioners and the respondent-funds' claims against both petitioners. (*Id.*)

Petitioners do not profess disagreement with the court of appeals' determination that there was a legitimate dispute as to whether the collective agreement provided that the respective claims involved in this action were subject to the arbitration procedure, and if so, whether there was a waiver of that process by any of the defendants. Such a disagreement concerning the meaning of a particular contract would in no event warrant a writ of *certiorari*. Instead, petitioners assert as a matter of law that because the contract provides for a grievance and arbitration procedure, exhaustion of that procedure is a pre-condition to suit without regard to whether the particular claim sued upon is subject to arbitration. That contention derives no support from the decisions with which petitioners assert a conflict.

Petitioners rely most heavily on *Republic Steel Corp. v. Maddox*, 379 U.S. 650. (Pet. i, 20-21.) *Maddox* came to this Court after a full trial. The agreement expressly provided for a three-step grievance procedure to be followed by binding arbitration which dealt with the precise controversy concerning which the employee sought to bring suit (see 379 U.S. at 651, text and note at n.1), and provided further that the arbitration remedy thus provided was to be exclusive (*id.* at 657, 659). The decision below is entirely consistent with the holding of *Maddox*.[8]

There is, of course, no rule of law which provides that if a collective agreement contains an arbitration clause,

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[8] In their question presented (Pet. i) but not in the body of their argument, petitioners rely also on *Vaca v. Sipes*, 386 U.S. 171. But insofar as *Vaca* deals with the requirement of exhaustion, that decision merely follows *Maddox*. (*Id.* at 184.) Indeed, it was not disputed there that the plaintiff-employee's unlawful discharge claim in *Vaca* was subject to the grievance-arbitration procedure.

all disputes arising under the agreement are arbitrable. As this Court has repeatedly emphasized, arbitration is a matter of contract. (See, *e.g.*, *Steelworkers v. Warriors & Gulf Nav. Co.*, 363 U.S. 574, 582; *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241-245; *John Wiley & Sons v. Livingston*, 376 U.S. 543, 546; *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374.) Whether a particular dispute is arbitrable is very much a matter of interpretation of the agreement. (Compare *Atkinson*, *supra* with *Drake Bakeries v. Bakery Workers*, 370 U.S. 254, 256-260.) The decision below remanding on the exhaustion issue merely determined that the meaning of *this* agreement's arbitration clause is ambiguous on the record here and that a summary judgment on the ground that exhaustion is required should not have been granted. That approach is entirely in accord with the principles declared by this Court.

C. Question IV Presented By Petitioners Is Not Worthy Of This Court's Review.

Petitioners' fourth question presented challenges the court of appeals' ruling that the complaint herein states a cause of action under the antitrust laws. (Pet. 21-28). Here again, the court of appeals did *not* decide the case on the merits against petitioners, but only reinstated the the complaint which had been dismissed by the district court. In rejecting the contention, renewed by petitioners here, that their alleged conduct is by reason of the labor laws exempt from the antitrust laws, the court of appeals quoted with approval the views of the Ninth Circuit in *California State Council of Carpenters v. Associated General Contractors, Inc.*, 648 F.2d 527, 534: "*A fortiori*, if the statutory exemption is inapplicable to business group conspiracies involving unions, the exemption cannot be read to immunize anti-competitive conduct on the part of employers acting alone." (See 690 F.2d at 531.) Subsequent to the decision below, this Court reversed the Ninth Circuit's decision in *Associated General Contractors* on the ground that the complaint in that case did not

sufficiently allege that the plaintiff unions were "injured in [their] business or property by reason of anything forbidden in the antitrust laws" to recover treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15. (*Associated General Contractors of California v. California State Council of Carpenters*, — U.S. —, 51 L.W. 4139 (Feb. 22, 1983).)

(i) This Court's *Associated General Contractors* decision does *not* undermine the court of appeals' decision in this case, because *that court did not decide the standing issue, but instead carefully reserved that issue for consideration by the district court on remand.* (690 F.2d at 535-536.) Indeed, the court of appeals expressed agreement with the analysis of the "standing" issue offered by Judge Sneed's dissent in the Ninth Circuit in *Associated General Contractors*:

> Although our understanding of the rationale behind *Connell* [see p. 14 *infra*] leads us ineluctably to the conclusion that a cause of action exists, we are in agreement that the issues regarding standing are conceptually distinct. As the standing issue has been neither addressed nor briefed by either of the parties, we think it wise simply to direct it to the district court's attention on remand, so that the court can determine which of the Unions or Funds are proper parties to this case after full development of the factual and legal issues by the parties. [690 F.2d at 536.]

In remanding, the court of appeals "direct[ed] the district court to consider the effect of our decision in *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976), and the Supreme Court's most recent pronouncement in the area, *Blue Shield v. McReady*, —— U.S. ——, 102 S.Ct. 2540, 73 L.Ed.2d (149 (1982)" (690 F.2d at 536, n. 27). In the course of that footnote the court of appeals discussed *Tugboat* and *McReady* and recalled that in *Tugboat* the Fifth Circuit had "specifi-

cally refused to endorse the broad holding of the Third Circuit in *Int'l Ass'n of Heat & Frost Insulators v. United Contractors Ass'n, Inc.*, 483 F.2d 384 (3d Cir. 1973), *modified* 494 F.2d 1353 (3d Cir. 1974), that union members possessed antitrust standing on the basis that they were employees of the contractors *against whom* the conspiracy was aimed." (690 F.2d at 536-537, n.27 emphasis in original.)

Of course, if this Court's decision and reasoning in *Associated General Contractors* are, to any extent, inconsistent with the court of appeals' directions on the standing issue, the district court must, on remand, comply with this Court's views. Given the interlocutory stage of the case, and the tentative nature of the court of appeals' instructions, it does not appear to us to be necessary that this Court grant *certiorari* on the standing issue (which petitioners have not sought) in order to accomplish this result. Nevertheless, in order to avoid any controversy over the proper course to be followed by the district court, we do not oppose a grant of *certiorari* and a remand that directs the court of appeals to instruct the district court to consider the issue of the plaintiffs' standing on the basis of *Associated General Contractors*.

(ii) Petitioners concede that on the merits the Fifth Circuit agreed with their "basic rationale" concerning the scope of the labor exemption. But petitioners contend that the court of appeals "misapplied" that basic rationale by analyzing "the pleadings as somehow alleging a concerted refusal to deal not with the unions themselves, but with other contractors who hire union workers, or to allege a concerted refusal to deal with contractors who did not create 'double-breasted' union-nonunion arrangements." (Pet. 24.) It should go without saying that only the most extraordinary circumstances, not asserted to be present here, would justify review *at an interlocutory stage* of a court of appeals' interpretation of a complaint, as opposed to the complaint's legal sufficiency as so in-

terpreted. Moreover, it is petitioners, not the court of appeals, who have misread the complaint.

Having carefully approved dismissal of those portions of the complaint which "allege merely a concerted refusal to deal with the unions in an attempt to restrain competition in wages and working conditions," the court of appeals, properly construing the complaint "liberally" (690 F.2d at 534 citing *McLain v. Real Estate Board, Inc.*, 444 U.S. 232), continued:

> Closer inspection of the pleadings reveals two theories which do allege anticompetitive effects outside of the labor market *per se*. The first is that defendants have engaged in a concerted refusal to deal not with the Unions themselves, but with other contractors who hire union workers. The second involves a concerted refusal to deal with contractors who do not create "double breasted" union-non-union arrangements. [690 F.2d at 534.]

Accordingly, that court concluded that the complaint alleged agreements which were non-exempt on the authority of *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616. (See 690 F.2d at 534-535.) Petitioners object not to the court of appeals' understanding of *Connell*, but to its interpretation of the pleadings (Pet. 24); they assert that "the agreement in question [here] is a typical collective bargaining agreement negotiated at arm's length between a council of unions and an employer association. It contains no illegal provisions such as those found in *Connell*." (Pet. 27.) In so arguing, petitioners simply refuse to face up to the court of appeals' careful description of the complaint, for example, § 10(b) thereof, discussed at 690 F.2d 534.

If, notwithstanding this Court's ruling in *Associated General Contractors*, respondents establish on the remand already ordered by the court of appeals that they have standing, and *if* respondents prove the allegations of the complaint that provided the basis of the court of appeals'

determination that a cause of action is stated, the petitioners may ultimately be able to present an antitrust labor exemption issue warranting this Court's review. At present, however, they are merely engaged in a futile quarrel with the court of appeals as to the *meaning of the complaint.*

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be (1) denied in full; or (2) granted for the limited purpose of vacating the judgment of the court of appeals for further consideration in light of *Associated General Contractors of California v. California State Council of Carpenters*, —— U.S. ——, 51 L.W. 4139 (Fed. 22, 1983), see p. 13, *supra*.

Respectfully submitted,

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